Supreme Court, U.S.
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86-1117

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

RAYMOND BARTMAN, et al.,

Plaintiffs,

v.

ALLIS-CHALMERS CORPORATION, INTERNATIONAL UNION UNITED AUTOMOBILE AEROSPACE, et al.,

Defendants.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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December 30, 1986

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QUESTIONS PRESENTED FOR REVIEW

1. Has an employer acted to discriminate on the basis of age against its older retirement eligible employees when it (a) knowingly and deliberately misleads such employees into believing that the employer will in fact exercise its right to modify or eliminate substantial retirement benefits during a period of post-collective bargaining agreement work, when in fact the employer had no plans to modify or eliminate such benefits and (b) acts to unilaterally announce directly to the work force only that wages would remain the same while deliberately refusing to disclose that retirement benefits were also to remain unchanged, thereby (c) causing 64% of older retirement eligible employees to refuse the employer's offer

of a post-collective bargaining agreement work opportunity and instead, to retire so as to preserve their existing retirement benefits while none of the younger workers refused the employer's offer of post-collective bargaining agreement work?

2. Does a union which abandons the age discrimination claims of forced retirees during the collective bargaining process in order to further the interests of younger workers unlawfully discriminte against the forced retirees on the basis of their ages?

A LIST OF ALL PARTIES TO THE PROCEEDING BELOW:

The caption of the case in this Court contains the names of all parties except for the below listed petitioners.[1]

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[1]. Kenneth Borgwardt, Albert Borski, William Bowman, Lloyd Brown, Richard Chojnacki, Oscar Cobbs, Conrad

Corcoran, August Drazkowski, Harvey Edminster, Jerry Eldredge, Eugene Emerich, Paul Evancy, Albert Gerlat, Philip Gumz, Rodney Hoover, John Ivkovich, Karl Jatczak, Leonard Johnson, Thomas Kendall, Adolph Kinstetter, Gregory Knich, Robert Kohls, Ralph Kosewski, Joseph Kosso, Anthony Kostich, John Kruesh, Bernard Kurth, Anton Kusy, Joseph Lasecki, James Leonard, Voldemar Liepaskalns, Gordon Loiselle, Arthur Makila, Norman Maronn, Alvin Moede, Alfonso Monar, Dale Nelson, Bernard Pagels, Robert Perling, Heinz Plieth, Philip Quartana, Raymond Reed, Charles Richardson, Doris Robinson, Donald Schwartz, Robert Swatloske, Thomas Szyper, Thomas Szyperek, Nolan Taylor, James Ullsperger, Edward Weitkunat, Eleanor West, Kenneth Zalewski, Wallace Azlewski, Leslie Luoma, and Rudolph Olson.

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REPORTS OF OPINIONS DELIVERED IN THE COURTS BELOW

The opinion of the Court of Appeals for the Seventh Circuit below is reported as Bartman v. Allis-Chalmers Corp., 799 F.2d 311 (7th Cir. 1986).

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was rendered on August 20, 1986. Appendix at 32, 33 (hereinafter cited in the form "A- __"). The Petition for Rehearing and suggestion for Rehearing En Banc was denied by the Seventh Circuit Court of Appeals on October 1, 1986. The jurisdiction of this court to review by means of writ of certiorari is invoked pursuant to 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

29 U.S.C. Sec. 623(a) provides:

> It shall be unlawful for an employer -

> (1) to . . . discharge any individual or otherwise discriminate against any individual with respect to his . . . privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age;
>
> . . . .

29 U.S.C. Sec. 623(c) provides:

> It shall be unlawful for a labor organization -
>
> (1) . . . otherwise to discriminate against, any individual because of his age;
>
> (2) to limit, segregate, or classify its membership . . . in any way which would deprive or tend to deprive any individual of employment opportunities, or which would limit such employment opportunities or otherwise adversely affect his status as an employee . . . because of such individual's age;

. . . .

STATEMENT OF THE CASE

1. Procedural History

This action was commenced in March, 1983, on behalf of 65 former employees of Allis-Chalmers Corporation (A-C). Plaintiff's demanded a jury trial. This lawsuit contends that A-C violated the Age Discrimination in Employment Act (ADEA), 29 U.S.C. Secs. 623(a)(1) and (2) under both theories of disparate treatment and disparate impact by forcing the retirement of approximately 250 employees, the plaintiffs among them; liability of the defendant Union Local 248 of the United Auto Workers (Union) is premised upon its age discriminatory conduct during bargaining which occurred after the plaintiffs had left the work force in violation of 29 U.S.C. Sec. 623(c)(1) and (2). Second

Amended Complaint. Jurisdiction in the District Court was founded on 28 U.S.C. Sec. 1331 and 1337 and 29 U.S.C. Sec. 626(c)(1). Both defendants moved for summary judgment. On July 31, 1985, the District Court granted the motion of each defendant and a judgment issued dismissing the case. A-11 to -31. Plaintiffs appealed to the Court of Appeals for the Seventh Circuit on August 7, 1985.

The Court of Appeals affirmed the District Court. A-1 to -10; 799 F.2d 311. A timely petition for rehearing en banc was denied on October 1, 1986. A-33.

2. Facts:

A. A-C'S CONDUCT.

In late 1981, with a collective bargaining agreement in place and not set to expire until November 1, 1982, A-C notified the Union that it sought

concessions in the then-existing collective bargaining agreement, both with respect to wages and benefits. Roznik Aff. paragraph 2; Collins Aff. paragraph 14. The Union rejected the demands for concessions pointing out that A-C was profitable at the time and rejecting the claim that labor costs were out of line for the industry. Collins Dep. at 10-13.[2]

A-C stated directly to employees in late 1981 and early 1982 its desire to achieve cost reductions through retirement benefits cuts.[3] As early as

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2. This deposition, along with several others cited throughout this petition, were made part of the record as attachments to the affidavit of Robert C. Angermeier. A-44. Depositions of Kern, Roznik and Equitz, each spanned two days so that references to those depositions indicate which day - the first or second - was involved.

3. From October, 1981 through February, 1982, A-C management conducted what the Union characterized as a "propaganda campaign" during which A-C

the spring of 1982, A-C learned, by conducting studies, that its announced desire to seek cuts in pension and health benefits would result in extensive retirements of older workers with 30 or more years of seniority, all of whom were within the age group protected by ADEA, so that employees

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attempted to directly convince the employees that labor costs were excessive. Collins Aff. paragraph 21. A-C communicated its desire for reductions in the area of retirement benefits directly to employees in mandatory meetings called in November and December, 1981. Equitz Dep. II at 4-6, 10. A -36, -42. (The affidavit of Plaintiff Monar is virtually identical to that of all other plaintiffs in paragraphs 1 - 6.) A-C also sent directly to each employee correspondence dated February 3, 1982, signed by the president of the corporation, Wendell Bueche, which reiterated the demand for labor costs concessions and specifically identified the area of benefits as a target for reductions. A-60. When the company spoke of potential reductions in the area of benefits in this letter, it meant pension and health benefits. Equitz Dep. I at 21. Plaintiff's understood that this was the company's desire and intention as well. A-36.

could gain the retirement benefits of the existing contract. The anticipated levels of retirement fit A-C's plans for a declining work force.[4]

At the bargaining table, however, A-C never proposed modification or reduction of pension benefits and respecting health insurance, only proposed the addition of a co-pay

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[4]. In a report prepared by Dan Kern, manager of employee relations and communications for A-C on March 19, 1982, he projected that approximately 200 to 250 retirements could be anticipated by November 1, 1982, due to the fears of employees that there would be changes in pension and health benefits. An additional study was undertaken by A-C in April of 1982 to gauge the impact of that number of retirements which had been estimated by Dan Kern. That additional report included that retirements in the 200 to 250 range were preferable to A-C as it was in line with A-C's overall projections for a declining work force. The report was sent to A-C president, Wendell Bueche with copies to Howard Equitz and Dan Kern and others. Angermeier Aff., Exhibit 14; Equitz Dep. II at 14-15, 21.

feature. Equitz Dep. I at 21; Kern Dep. II at 25. At no time did A-C go back to the employees to tell them it had changed its position over what it had told them in the late 1981 and early 1982 communications. Equitz Dep. II at 3.

As the expiration of the collective bargaining agreement approached on November 15, 1982 (it had been extended by mutual agreement of the parties), and during the time it was clear that A-C would insist on work without a contract (a "window period"), A-C blocked every effort to disclose its true position to the work force - that it had no plans to modify pension and health plans and would give prior notice before doing so.[5] This was done with full knowledge

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[5]. A-C had no intention to exercise its unilateral right to make changes in retirement benefits during the period of work without a contract.

that such actions would lead to massive retirements. Kern Dep. I at 17;

Bueche Dep. at 15. In a meeting attended by upper management of A-C in early November, 1982, Dan Kern proposed issuing a statement to the employees which would have said that A-C had no imminent plans to modify retirement benefits and that if such changes were to be made, there would be advanced notice. Kern Dep. I at 120-23; A-55. Although this proposed statement was never issued by A-C because it was rejected by Howard Equitz and company president, Wendell Bueche for reasons other than its accuracy (bargaining leverage), Bueche Dep. at 27, Equitz Aff. paragraph 16 & 17, A-C was, through Daniel Kern, actually making such a statement directly to individual workers but A-C would not put the statement in writing. Collins Dep. at 91; Equitz Dep. I at 73-77. A-C also went so far as to refuse to let the Union issue a statement of A-C's true intention during the "window period" unless the Union would agree to hold A-C harmless, a liability the Union understandably would not accept. Collins Dep. at 95. This establishes both what A-C's true plans were during the "window period" and that it blocked every effort to have those intentions communicated to the work force. On the other hand, A-C had no problem communicating directly with employees earlier its original (and by now abandoned) desire to effect retirement benefit cuts. See, note 3, supra.

Angermeier Aff. Exhibit 12 (b).

A-C knowingly fueled older employees' fears its previous actions had created of retirement benefit modifications (see, notes 3 and 4, supra) by annoucing to the work force on November 12, 1982, A-56 to 57 that it was offering work during the "window period" at the same wage rate, while deliberately remaining silent in that notification (and otherwise) concerning any other benefits it was actually continuing to offer workers. See, note 5, supra. This was a policy deliberately considered, adopted and implemented by A-C and which had both explicit (bargaining leverage) and implicit (declining work force) purposes.

In response to A-C's deliberate policy to make retirement eligible employees believe that retirement benefits would be cut or eliminated during the "window

period", there were approximately 300 retirement applications submitted (including those of the plaintiffs) in the 16 day period before the expiration of the collective bargaining agreement on November 15, 1982. Angermeier Aff. Exhibit 6, 7. This was approximately 64% of the retirement eligible employees. On November 15, 1982 alone, 216 individuals submitted retirement applications. Angermeier Aff. Exhibit 7. The average age of persons retiring on November 15, 1982, was 55.5 years. A-45. On the average, employees who retired effective November 15, 1982, had begun working for A-C in 1948; id.; none had begun working for A-C after 1953. Plaintiffs' Affs. paragraph 2. By contrast, the employees who were called to replace the retirees were, on the average, 36.7 years of age, and, on average, began working for A-C in 1970.

A-47, -48. The difference in age between the average retiree who retired on November 15, 1982, and the average employee who was called to replace that worker was 18.8 years. None of the younger employees who were not eligible for early retirement[6] refused to work during the "window period".

Negotiations continued beyond

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[6]. The retirement and pension plan provided employees with 30 or more years of service to the company the ability to retire and enjoy a monthly pension payment as well as a comprehensive medical insurance benefit plan. Equitz Aff. Exhibit 1 at 90. The benefits which a retirement eligible employee risks losing were substantial; considering health benefits alone, it would have cost an individual age 55 and a dependent spouse, $4,062.86 to obtain annual medical insurance coverage in 1983; in a comparable period in 1984, a person aged 55 would spend $5,298.58 for annual medical insurance; these plans would not include the dental and eye care which the A-C plan included. Derrenne Aff. In addition, an average employee risked the loss of approximately $3,600 in supplemental pension benefits annually until age 62. The "basic pension" was not at risk because it was vested.

November 15, 1982, between A-C and the Union. During the period between November 15, 1982 and November 30, 1982, employees who had retired were permitted to withdraw their applications, Equitz Aff. paragraph 18, but without receiving any new or different information than had been communicated to them by A-C prior to November 15, 1982. Only 61 persons rescinded their retirement applications and returned to work during this period. A-4; 799 F.2d at 313.

Although at the expiration of the collective bargaining agreement and thus during the "window period" A-C had the power to alter the pension plan or even discontinue it pursuant to Sec. 10.1 of the Retirement and Pension Plan, Equitz Aff. Exhibit 1 at 114 - 15, the plaintiffs and the other retirement eligible employees who actually decided to retire on or before November 15,

1982, did so not because A-C simply had the power to make changes in retirement benefits but because A-C's direct communications with employees had led them to believe that it was probable that A-C would in fact exercise this power, directly contrary to A-C's true plans to continue such retirement benefits unchanged through the "window period". Plaintiffs in their affidavits put it this way:

> Based on the company's conduct in 1982 [referring to, among other things, the company's November 12, 1982 notice regarding work during the window period which was silent about pensions and medical benefits] and in particular its stated desire to cut costs by reducing benefits, I believed there was a real possibility that the company would do so after the contract expired. I could not risk the financial well being of myself and my dependents by continuing my employment under the circumstances created by the company.

A-38 to -39. (emphasis added).

B. THE UNION'S CONDUCT.

Plaintiffs have asserted that the Union's liability attaches for their conduct after November 30, 1982. Second Amended Complaint. Within a 30 day period immediately preceding November 15, 1982, one-third of the Union's active employed members had retired under conditions which the Union had complained were coercive. Angermeier Aff. Exhibit 15 & 12(b).

At a Union membership meeting in early December, at least one recent retiree spoke from the floor and urged the Union to "negotiate with A-C to try and get my job back." She indicated that her retirement was not voluntary. Plaintiff West Aff. paragraph 10. It was understood that West's request was on behalf of all the retirees. A-41 to-42. At that meeting, when asked "can you negotiate us back?" Union president

Roznik replied "Yes, I will try." Roznik understood that various older workers wanted simply to get back to work and they wanted the Union to negotiate their jobs back just like any other time. Roznik Dep. I at 145-46.

Despite the fact that the Union had seen over 300 of its active members submit early retirement applications in the sixteen days immediately preceding November 15, 1982, under circumstances the Union acknowledges as coercive, the Union failed to follow through on its assurances that it would negotiate to get the retirees back by engaging in substantial or vigorous bargaining to return those members to the work force: The Union raised the issue of November retirees at collective bargaining sessions on only two occasions after December 1, 1982; Roznik Dep. I at 153; the discussion was brief, approximately

5 to 10 minutes; Id. at 155; the company was not interested in the subject; Roznik Aff. paragraph 17; Mr. Kern of A-C did not recall the subject being brought up at all in negotiations; Kern Dep. II at 30. From the outset of post-November 30, 1982 bargaining, the Union leadership indicated that the interests of older workers were expendable; Union president Roznik stated in early December that he had to be more concerned with younger workers with 7 years seniority than older workers who had vested pension rights. Monar and West Affs. paragraph 8; A-41.

The Union was also willing to trade off the interest of older workers for its own institutional interests; this was in connection with the dismissal of N.L.R.B. charges against the company (charges which included an allegation of forced retirements). Collins Aff.

Exhibit 7, at 9-10. Also involved in the N.L.R.B. charges was the allegation that A-C was unlawfully contracting out work to subcontractors and to other non-union and non-UAW facilities; the Union was able to obtain concessions in bargaining in late January where A-C agreed that tractor production would remain in West Allis. Collins Aff. Exhibit 8. Yet this did not resolve all of the issues surrounding the pending N.L.R.B. charges, especially the forced retirement issue. Rather than bargain for the forced retirees at this point, the Union injected a completely colatteral concern of the International UAW: The recognition of a previously unrecognized bargaining unit at Batavia, Illinois; the issue of the recognition of the Batavia unit was not a part of the N.L.R.B. charges at issue; rather this was a separate and long standing

dispute between A-C and the International Union which related to a disputed election which was held years earlier and was already in the courts. Shoemaker Aff. paragraph 7. The Union injected the recognition of the Batavia unit as the negotiations were about to conclude. Id., paragraphs 8-9. The Union offered to drop the N.L.R.B. charges which included the forced retirement charge in exchange for recognition of the Batavia unit. Id., paragraph 9. The company accepted and a new contract was reached. The tentative collective bargaining agreement was ratified on Sunday, February 6, 1983. On February 7, 1983, the Union requested that the N.L.R.B. withdraw the unfair labor practice charges.

REASONS FOR GRANTING THE WRIT

I. A-C DID TAKE ACTIONS WHICH CAUSED THE RETIREMENTS OF PLAINTIFFS IN VIOLATION OF THE ADEA.

A brief overview of the circumstances and impact of the Seventh Circuit's decision is in order. This case arises in a context which is sadly being repeated throughout this country. We are inundated with accounts of manufacturers in this country who, in an effort to compete in an evolving world market and a flood of cheaper foreign goods, are forced to seek both concessions from union workers in wages and benefits, and to eliminate jobs altogether. This Court is faced with a serious question of the propriety of employer conduct likely to recur in a variety of comparable contexts. The essential question is this: Will the ADEA be read to countenance the acts of an economically troubled employer which,

for purposes of bargaining leverage and work force reductions, deliberately misleads its retirement eligible work force into believing that they must choose between sacrificing benefits earned through 30 years of loyal service in order to continue working, a choice not imposed on younger workers. Unless the Seventh Circuit's approval of such conduct in this case is reversed, other employers in a similar economic dilemma will feel free from ADEA concerns to effect work force reductions and to attempt to gain bargaining leverage solely at the expense of older workers simply because they, not younger workers, have worked long enough to have something to lose -- earned retirement benefits.

In affirming the District Court's grant of summary judgment to A-C, the Seventh Circuit Court of Appeals relied

upon a single concept to reject the imposition of ADEA liability both for purposes of a disparate impact and a disparate treatment analysis. The Court of Appeals started with the premise that when the collective bargaining agreement expired, A-C had the right to modify its retirement benefits. According to the Court of Appeals it was this right, viewed in isolation, and without regard to any of the actions taken by A-C to lead employees to believe that exercise of that right would be probable that caused the flood of retirements in November, 1982, including those of the plaintiffs. A-6, -7. The Court used this view of the facts to conclude that there had been no constructive discharge because nothing that A-C did made plaintiffs' working conditions intolerable, A-6, that no employment practice of A-C had caused a disparate

impact on A-C's older workers, id.; and that no legal duty arose for A-C to declare its intention about retirement benefits during the "window period", id. at 7[7]. 799 F.2d at 314-15.

Viewed as an improper weighing of conflicting facts (the Court of Appeals view that plaintiffs were motivated to retire by the simple existence of the

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7. This was the only way in which the Seventh Circuit found fault with any of plaintiffs' theories of ADEA liability. For disparate impact purposes A-C never offered a business necessity defense. Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971). Under the indirect disparate treatment theory of McDonnell-Douglas v. Green, 411 U.S. 792 (1973) plaintiffs (1) were in the protected age group (2) were qualified to continue employment and (3) were replaced by younger workers. Finally, for purposes of direct evidence of discriminatory disparate treatment under TWA, Inc. v. Thurston, ___ U.S. ___ 105 S.Ct. 613, 625 (1985) employment practices based on an employee's status as retirement eligible are age discriminatory. EEOC v. Borden's Inc. 724 F.2d 1390, 1393 (9th Cir. 1984): EEOC v. Westinghouse Electric Corp., 725 F.2d 211, 222 (3d Cir. 1983).

power of A-C to modify retirement benefits versus the plaintiffs' stated view that it was the actions of A-C in misleading them into believing that this power would actually be exercised during the "window period") the Seventh Circuit's opinion runs squarely afoul of this Court's long standing view that on a motion for summary judgment it is improper to essentially conduct a trial by affidavit. See, e.g., Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 472-73 (1962).

Another view of the Seventh Circuit's opinion and reasoning process must also be explored, however. It may very well be that the Seventh Circuit Court of Appeals felt that the dominant reason for the plaintiffs' action in retiring were the circumstances which were out of the control of A-C (the expiration of the collective bargaining agreement and

with it, the inherent uncertainty whether A-C would exercise the power it reserved to modify, eliminate or reduce retirement benefits following the expiration of the collective bargaining agreement) rather than the plaintiffs' stated reason which focused upon the acts of A-C (the repeated actions of A-C in its statements directly to employees which created the reasonable belief that it would, indeed, change those benefits during the "window period" even though its intentions in that regard had changed). Assuming this to be the case,[8] the Seventh Circuit's opinion effectively holds that considering the existence of both discriminatory acts of

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[8]. The Seventh Circuit's opinion does take note that A-C's desire for concessions in wages and benefits was communicated directly to the employee population as a whole, A-2, and that A-C had announced that work during the window period would be at the old contract's wage rate, A-3.

A-C and other nondiscriminatory circumstances the contribution of A-C's acts was not sufficient to violate the terms even of 29 U.S.C. Sec. 623(a)(2). First, such a ruling squarely conflicts with this Court's decision in TWA, Inc. v. Thurston, ____ U.S. ____, 105 S. Ct. 613 (1985). Secondly, as will be seen below, such a view of ADEA liability also conflicts with the broad statutory provisions embodied in 29 U.S.C. Sec. 623(a)(1) and (2), which were taken in haec verba from Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000e-2(a)(1) and (2). Lorillard v. Pons, 434 U.S. 575, 584 (1978). Thirdly, the Seventh Circuit's line of reasoning conflicts with several other courts of appeals opinions applying the ADEA.

The opportunity for work during the

"window period", created by A-C[9] brought into play the principles of Thurston, 105 S. Ct. at 621, which observed:

> The act does not require TWA to grant transfer privileges to disqualified captains. Nevertheless, if TWA does grant some disqualified captains the "privilege" of "bumping" less senior flight engineers it may not deny this opportunity to others because of their age.

Here, the period of work itself was an employment "opportunity" bringing with it the duties imposed by 29 U.S.C. Sec. 623(a)(2) for A-C not to take any action which would "deprive" or "tend to deprive" older workers of the employment opportunity. Were the existence of the opportunity alone not enough to bring into play the duties under Sec.

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9. Once the Union decided not to strike when the contract expired it was A-C's choice alone to either lock out employees or offer continued work. Stokely-Van Camp, Inc., 186 N.L.R.B. 440 (1970); Iron Molders Union v. Allis-Chalmers, 166 F.2d 45, 52 (7th Cir. 1908).

623(a)(2) and Thurston, A-C took a further step on its own by attempting to induce employees to take advantage of the "window period" opportunity for work it was offering. A-C chose to tell the employees some but not all of the terms of employment -- just the wages. Like the benefit of transfer rights in Thurston, A-C may not have had to tell its employees what any of the terms of employment would be[10], but once having

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[10]. Ordinarily the principle that a union is the exclusive bargaining representative of employees means that the union bears the burden of communicating with the work force. However, exceptions exist where the employer may communicate directly with the employees. E.g., N.L.R.B. v. Bradley Washfountain Co., 192 f.2d 144 (7th Cir. 1951); Procter & Gamble Mtg. Co. (Port Ivory), 160 N.L.R.B. 334 (1966).

On the specific subject here, A-C refused to let the Union tell employees that the terms and conditions of "window period" work would also include, in addition to the same wages, also the same benefits. See, note 5, supra.

undertaken to do so, A-C certainly could not withhold the disclosure of some of those employment terms in a way which would "deprive" or "tend to deprive" older workers of the employment opportunity in violation of the ADEA. Yet, that is what was knowingly done by A-C. By telling employees only that wages would remain the same, A-C successfully induced all of the non-retirement eligible workers to come to work while 64% of the retirement eligible workers did not come to work.[11]

Moreover, viewing the Seventh Circuit's reasoning as excusing A-C from the steps it took to fuel older employee fears of benefit changes which might have existed in the abstract in any

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[11]. Substantially lower percentages in disparate impact cases have been recognized to support a conclusion of discriminatory disparate impact under Title 7. Dothard v. Rawlinson, 433 U.S. 321, 330 n.12 (1977).

event, such action amounts to a failure by the Seventh Circuit Court of Appeals to apply the broad language of 29 U.S.C. Sec. 623(a)(2) so as to recognize an appropriate imposition of liability. This Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971) squarely stated that the comparable provisions of Title VII contained in 42 U.S.C. Sec. 2000e-2(a)(2) indicated a congressional mandate to attach liability even to the unintentional consequences of employment practices. Id. at 432. The Court had no difficulty finding that "[t]he objective of Congress in the enactment of Title VII is plain from the language of the statute." Id. at 429. The Court went on to observe in language particularly applicable in this case that "Congress has now required that the posture and condition of the job seeker be taken into account." Id. at 431. A

further indication of the broad construction accorded the language contained in 42 U.S.C. Sec. 2000e-2(a)(2) is set forth in Connecticut v. Teal, 457 U.S. 440, 451, 453, 455 (1982), where the court repeatedly emphasized that it was employment "opportunty" which Congress sought to protect from unnecessary employer created barriers. Accordingly, for the Seventh Circuit to effectively say that whatever A-C did, it did not, at the least take steps to "tend to deprive" older workers of the employment opportunity during the "window period", amounts to an unduly narrow construction of the broad provision of 29 U.S.C. Sec. 623(a)(2) which were taken in haec verba from comparable provisions of Title VII. This Court simply has not yet faced in any of its Title VII or ADEA cases the broad construction of the language which

should be afforded to the proscription against any employer action which even "tends to deprive" older employees of employment opportunities such as was done in this case. However, in Bibbs v. Block, 778 F.2d 1318 (8th Cir. 1985) where the court, in dealing with a mixed motive case (where, like here, both discriminatory and non-discriminatory reasons arguably are factors in an employment decision) concluded that the broad language of 42 U.S.C. Sec. 2000e-2(a)(2) required a finding that employment discrimination had occurred because employer actions "tended to deprive" an employee of a promotion opportunity, even though the employee would not have actually received the job absent the race discrimination. The Seventh Circuit's opinion in this case

is clearly to the contrary.[12]

Finally, the Seventh Circuit's refusal to find liability in this case runs squarely contrary to those courts from other circuits which have held that limiting or classifying employees for purposes of benefits on the basis of retirement eligibility is age discriminatory. EEOC v. Borden's, Inc., 724 F.2d 1390, 1393-94 (9th Cir. 1984); EEOC v. Westinghouse Electric Corp., 725 F.2d 211, 222-23 (3d Cir. 1984). Similarly, the Seventh Circuit's opinion

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12. This case is not nearly as close a question of the relative effects of mixed discriminatory and nondiscriminatory acts. The plaintiffs squarely identified A-C's previous direct statements to them in late 1981 and early 1982 of a desire for retirement benefit cuts (which were never corrected when A-C's intentions changed) plus, the announcement of A-C only that wages would remain the same during "window period" work as the reasons they believed, contrary to A-C's true intentions, that A-C would effect benefit cuts during the window period. A-38 to -39.

in this case contradicts the ruling in Geller v. Markham, 635 F.2d 1027 (2d Cir. 1980), cert. denied, 451 U.S. 945 (1981) where the court found that an employer's policy of hiring teachers below a certain experience level had a disparate impact on older workers due to a high correlation between experience and age. The same is true concerning Leftwich v. Harris-Stow State College, 702 F.2d 786 (8th Cir. 1983), where the court found that an employer's policy of reserving certain faculty positions for previously untenured teachers had an unlawful disparate impact upon older workers due to a high correlation between age and previous tenure.

II. THE UNION'S CONDUCT IN SACRIFICING THE INTERESTS OF THE FORCED RETIREES IN THE COLLECTIVE BARGAINING PROCESS WAS AGE DISCRIMINATORY.

Like the resolution of employer liability, the Seventh Circuit ran afoul

of the principles of Poller, supra, when it effectively resolved conflicting affidavits in the context of the summary judgment motion. Although the Seventh Circuit observed in its opinion that two of the plaintiffs had reported that Union president Roznik had told him his reason for Union inactivity on behalf of the retirees was because he was more concerned with younger workers who had no vested pension rights, A-8, -9, the Court went on to credit Roznik's Affidavit which explained his actions were for different, non-discriminatory reasons. Instead of recognizing that the accounts of the plaintiffs and those of Union president Roznik were mutually inconsistent, the Seventh Circuit attempted to harmonize the two differing accounts. Indeed, the Court chose to entirely credit Roznik's account and to effectively disregard those statements

made to Plaintiffs Monar and West. The Court said:

> At most, these statements [referring to the combination of Monar, West and Roznik accounts] show that the Union negotiators were attempting to advance many competing concerns. . . .
>
> . . . Roznik's decision that plaintiffs' cause was lost and that more could be done for other workers was no an act of age discrimination when viewed in the context of collective bargaining on a full slate of employment issues and in the absence of statutory rights. The Union's duty in this case were conflicting, and its resolution, at least as expressed by its local's president, reflect a pragmatic accounting of all relevant facts and factors rather than a decision to "dump" workers perceived to be of less value

A-9, -10 (Emphasis added.). What the Court ignored was the fact that when Roznik spoke to Plaintiffs Monar and West, he offered none of his four non-discriminatory reasons for the Union's conduct. Viewing the statements of Monar and West alone, as Poller would direct, such statements clearly evidence

discriminatory intent since they manifest a desire to draw distinctions between those employees who are retirement eligible from those who are not for purposes of obtaining the benefit of Union representation in the bargaining process. Distinction on this basis is age discriminatory. EEOC v. Borden's, Inc., 724 F.2d at 1393; EEOC v. Westinghouse Electric Corp., 725 F.2d at 222-23.

The effect of the Seventh Circuit's ruling is not only to fail to give sufficient breadth to the prohibition against Union conduct which "tends to deprive" older employees of employment opportunities contained in 29 U.S.C. Sec. 623(c)(2), but also to run afoul of the Seventh Circuit's own decision in Babrocky v. Jewel Food Co., 773 F.2d 857 (7th Cir. 1985) which imposed Title VII liability upon a union for not

protesting vigorously enough an employer's discriminatory practices. Similarly, the Seventh Circuit's opinion conflicts with the decision in Carey v. Greyhound Bus Co., Inc., 500 F.2d 1372 (5th Cir. 1974) where the court found the union jointly liable with the employer because the union could have taken affirmative steps to initiate negotiations with Greyhound in an effort to salvage for the union's ex-members, seniority that they inevitably and forseeably would lose upon being bumped from positions in a unit represented by another union. That court found the union liable even though the court recognized that such a step might have proved unavailing. Id. at 1379.

CONCLUSION

Quite apart from the effective conflicts which exist between the Seventh Circuit's opinion in this case

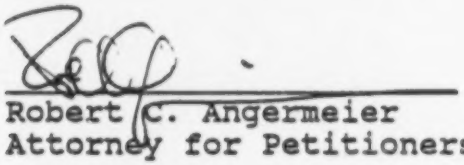
and the decisions of other circuits, this Court has recognized that it is appropriate to grant certiorari to decide whether lower courts have properly applied its most recent pronouncements (here, Thurston). Nashville Gas Co. v. Satty, 434 U.S. 136, 138 (1977). Further, this Court can address the disturbing trend in employment discrimination litigation noted by Judge Sweigert in a dissent as to the inappropriate use of summary judgment and as to disposition of cases which blunt the broad construction of employment discrimination rights initially set forth in Griggs v. Duke Power Co., supra, Fox v. A & P Tea Co., 772 F.2d 1372, 1381-82 (7th Cir. 1985).

Finally, review by certiorari is appropriate so that this Court may clarify, for purposes of the ADEA as well as the comparable language of Title

VII, the heretofor unexplained breadth of the prohibition against employer actions which "tended to deprive" employees of employment opportunities in a context where employer action combines with circumstances out of its control to limit employee opportunities.

For the foregoing reasons the petitioners respectfully ask that this Court grant the writ and review the Seventh Circuit's opinion in this case.

Respectfully submitted,



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APPENDIX

The Appendix to this Petition, because it is voluminous, is set forth separately.

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of December, 1986, three copies of the Petition for Writ of Certiorari and Appendix to Petition for Writ of Certiorari were mailed, postage prepaid, to:

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I further certify that all parties required to be served, have been served.

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